FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 8 1960
Clerk

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
I. Proceedings before the Board	3
II. The decision of the court of appeals	10
Argument	11
Conclusion	15

CITATIONS

Cases:	
National Labor Relations Board v. *Leland-Gifford Co.*, 200 F. 2d 620	12, 13
National Labor Relations Board v. *Quincy Steel Casting Co.*, 200 F. 2d 293	12
Ohio Power Co. v. *National Labor Relations Board*, 176 F. 2d 385, certiorari denied, 338 U.S. 899	13
Pittsburgh Plate Glass Co. v. *National Labor Relations Board*, 313 U.S. 146	14
Statutes:	
National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):	
§ 2(3)	3
§ 2(11)	3
§ 8(a)(1)	3, 9
§ 8(a)(3)	3, 9
§ 8(a)(4)	3, 9
§ 8(a)(5)	3, 9

495140—59——1

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 632

SOUTHERN BLEACHERY & PRINT WORKS, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 29–39) is reported at 257 F. 2d 235. The original decision of the National Labor Relations Board in the representation proceeding (B.A. 1–2)[1] is unreported. The subsequent decisions of the Board in the representation proceeding (B.A. 3–11, 32–35) and the unfair labor practice proceeding (B.A. 36–55) are reported at 115 N.L.R.B. 787, 1526 and 118 N.L.R.B. 299.

[1] "B.A." and "R.A." refer to the appendices filed by the Board and petitioner, respectively, in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1958. A petition for rehearing was denied on October 13, 1958. The petition for a writ of certiorari was filed on January 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the finding of the National Labor Relations Board in a representation proceeding that certain employees were not "supervisors" was supported by the evidence.

2. Whether the trial examiner, in a subsequent unfair labor practice proceeding charging a refusal to bargain with the certified union and discriminatory discharges, properly excluded evidence on the issue whether the employees were "supervisors" on the ground that the issue had been fully litigated in the representation proceeding.

3. Whether the trial examiner, while allowing the employer to show "specific acts" of dereliction of duty by the employees in defense to a charge of discriminatory discharges, abused his discretion in excluding, on the ground that it was an attempt to reopen the "supervisor" issue, generalized testimony that the employees had not "carried out the duties and functions and responsibilities" assigned to them as "Unit Supervisors."

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151,

et seq.) are set forth in Appendix A of the petition (Pet. 23–26).

STATEMENT

I

PROCEEDINGS BEFORE THE BOARD

In a representation proceeding, which forms part of the record here, the National Labor Relations Board determined that petitioner's machine printers were employees within the meaning of § 2(3) and (11) of the National Labor Relations Act and constituted an appropriate bargaining unit. Thereafter the Board certified the Machine Printers Beneficial Association ("the Union") as the bargaining representative of these employees. Petitioner refused to bargain with the Union on the ground, which it had unsuccessfully urged before the Board, that the machine printers were supervisory employees and hence not within the coverage of the Act. In the present proceeding, the Board found that petitioner had violated § 8(a)(5) and (1) by its refusal to bargain with the Union, and also that petitioner violated § 8(a)(1), (3) and (4) by discharging five of the machine printers for giving testimony against the petitioner in the representation case. The Board's subsidiary findings and conclusions may be summarized as follows:

A. *The representation case.*—The Union, on March 21, 1955, petitioned the Board for an election in a unit of petitioner's workers designated generally as "machine printers, including journeymen and apprentices" (B.A. 1). Petitioner contended that the unit was inappropriate since the printers were "super-

visors." The Board sustained this contention and dismissed the petition (B.A. 1–2). Thereafter the Board granted the Union's petition for reconsideration and oral argument (B.A. 3, R.A. 81–85). After oral argument held on September 27, 1955, in which all parties participated, the Board on March 13, 1956, with one member dissenting, reversed its prior decision, determined that the machine printers were employees and not supervisors, and ordered an election (B.A. 3–17).

At the time of the hearing in the representation proceeding, petitioner employed approximately 40 machine printers, of whom 30 worked in 3 shifts in the print works, and 10 worked in 2 shifts in the shirting print department (B.A. 4, 89–90). The total complement of the print room was 116, including 11 who were admittedly supervisors (*i.e.*, other than the machine printers); the total complement of the shirting print department was 41, including 6 admitted supervisors (B.A. 4, 89–90, 137, 138; 125, 163). The print room had 11 textile printing machines and the shirting print room had 4 (B.A. 8, 134–135). Machine printers qualify for the operation of these machines by a seven-year apprenticeship (B.A. 8, 154). Each printing machine is operated by a crew of four men, including a machine printer who is primarily responsible for the production and quality of the printed cloth and also exercises some authority over his less skilled helpers[3] (B.A. 4, 7, 88–89, 161–162). All the

[3] A back tender who stands behind the machine, a grey tender who stands at the side and a can boy for every two machines. The machine printer stands in front of the machine.

machine printer's faculties are required to assure that the cloth is properly set and conforms to the design before him (B.A. 5, 155–161). Approximately two-thirds of his time is devoted to the actual operation of the machine and most of the remainder to readying the machine for the next operation (B.A. 5, 104). While the machine is in operation, the printer never leaves it unless relieved by a foreman (B.A. 5, 161–163).

Prior to June 1950, the machine printers were concededly not supervisors.[3] In June 1950, petitioner changed the job designation of machine printer to that of "unit supervisor" and gave each printer a list of 10 instructions entitled "Basic Responsibility of Unit Supervisors"[4] (B.A. 4, 62–63). The instructions related to the responsibility of the printer as to the delivery of the maximum production with satisfactory quality; correct printing of the cloth; decisions as to material requirements and mechanical replacements of the unit; checking the time cards of the workers in his unit; recommending their hiring and firing and rate increases; and the taking of the necessary steps to report, reprimand, or recommend disciplinary actions upon infractions of company rules (B.A. 62–63). In addition, petitioner changed the method of computing the printers' pay by increasing their weekly base by $25.00 in lieu of a lower base pay plus a production bonus (B.A. 5, 6). They continued to receive a guar-

[3] In 1943, 1948 and 1949, the Board had conducted elections in a unit of machine printers, but no bargaining representative had been selected in any of them (B.A. 4).

[4] The list is reprinted at pp. 5–6 of the petition.

anteed base pay plus time and one-half for work over 40 hours per week, an arrangement not applicable to the group of admitted supervisors who were paid a straight salary (B.A. 6–7, 108, 138, 147).

The duties of the machine printers in setting up and operating their machines continued to require their constant attention for most of their working time, and no material change in their duties occurred after June 1950 (B.A. 5, 90–104, 109–110, 124–133, 142). Nor were they given greater responsibility for the quality of the work product (B.A. 6, 95–96, 127–128, 139). After June 1950, petitioner required the printers to initial certain forms prepared by admitted supervisors and given to the printers routinely for the addition of their initials, such as merit increase slips, time cards, accident reports and material requisition slips (B.A. 6–7, 92–97, 99–100, 110–113, 127–132). While some of the slips signed by the printers contained recommendations that employees be hired, fired, given merit increases, and be promoted or demoted, the signing was done as a matter of routine without the exercise of independent judgment and in some instances without examination or inquiry by the printers (B.A. 6–7, 99–100, 127, 130–131, 135–136).[5]

On the basis of the foregoing findings of fact the Board concluded (B.A. 10):

> * * * we are satisfied that the purported 1950 change in the status of the machine printers did

[5] Pay increases were usually allowed after a fixed period of time, and replacements for absent helpers were selected from a list not available to the printers, thus negativing any implication that the printers' "recommendations" were significant (B.A. 6, 7, 100–102).

not, in fact or in law, convert the machine printers to supervisors or deprive them of their employee status. The principal effect of the instructions given to the machine printers was to codify the control previously exercised by them over the less experienced grey tenders, back tenders and can boys, a control, as we have indicated, that is customarily exercised by any skilled craftsmen over their helpers and apprentices. To the extent that the 1950 instructions attempted to delegate to the machine printers power or authority beyond that of a craftsman, the absence, for all practical purposes, of the exercise of such authority negatives its existence. We find, therefore, that the machine printers are employees within the meaning of the Act.

Accordingly, the Board directed that an election be held to determine whether the employees wished to be represented by the Union (B.A. 10–11).

On March 22, 1956, petitioner filed a petition to vacate the decision of March 13, 1956, and to reopen the record for the taking of additional testimony (B.A. 18–19). Petitioner asserted that in August 1955 (prior to the oral argument on the Union's petition for reconsideration), it had abolished its shirting print department, consolidated all its printing operations into a single print room, abolished the jobs of its section foremen, and delegated the latter's duties to the machine printers. Petitioner alleged generally, but without particularizing, that as a result of the elimination of the section foremen's jobs, the machine printers were vested "with even more responsibility,

authority, and direction and power to enforce" the same. Petitioner further alleged that on November 11, 1955 (following the oral argument but prior to the Board's supplemental decision), it had issued to the machine printers "a recapitulation, reiteration and respecification" of their "duty, authority, and responsibilities"; that the machine printers were exercising those functions; and that those functions "are supervisory in nature." Petitioner did not, however, specify what the new instructions were or wherein they delegated any supervisory functions to the machine printers.

The Board denied the petition "because nothing further has been offered that warrants modifying the Board's decision" (B.A. 20).

The election was held on April 10, 1956 and was won by the Union (B.A. 32–33). The Board agent conducting the election refused petitioner's request that each voter be challenged as a supervisor (B.A. 20–22, 33). As found by the Regional Director in an investigation of the objections to the conduct of the election filed by petitioner, the Board agent properly refused the request for challenges after petitioner's counsel told him that he was not in possession of any fact not previously presented to the Board (B.A. 24–26). In its exceptions to the Regional Director's recommendations that the objections be overruled, petitioner repeated its contention that the direction of the election had been improper, but it did not challenge the Regional Director's finding concerning the statement by petitioner's counsel to the Board agent that he had no new evidence on the alleged supervisory status of the ma-

chine printers (B.A. 26–32, 33). On June 8, 1956, the Board concluded that the exceptions raised no substantial or material factual issues with respect to the conduct or results of the election and certified the Union as collective bargaining representative for the employees involved (B.A. 35).

B. *The unfair labor practice case.*—Following the certification of the Union, petitioner admittedly refused to bargain with it because of its claim that the machine printers were supervisors (B.A. 38, 74–75). In addition, petitioner had, on August 29, 1955, discharged five machine printers who had testified against it at the representation hearing held on May 5 and 6, 1955, allegedly because the two print rooms were to be combined, and because petitioner was not satisfied with the way these employees had carried on their duties as supervisors (B.A. 54–55, 176–179). Upon charges that both acts were unfair labor practices, the Board, after a hearing, concluded that petitioner's refusal to bargain with the Union violated § 8(a)(5) and (1) of the Act (B.A. 54–55). It also concluded, for reasons set forth more fully in its decision, that petitioner had discharged the five employees because they testified adversely to it in the Board's representation proceeding and that it had thereby violated § 8(a)(1), (3) and (4) of the Act (B.A. 54). The Board also rejected petitioner's contention that the trial examiner in the unfair labor practice proceeding had erroneously refused to permit petitioner to introduce evidence bearing upon the supervisory duties of the machine printers and, in support of its further claim that the dismissals were

not unlawful, the failure of the discharged printers to carry out those duties (B.A. 54).

The Board's order required petitioner to cease and desist from the unfair labor practices found; to bargain collectively with the Union; to offer reinstatement with back pay to the discharged employees; and to post appropriate notices (B.A. 56–57).

II

THE DECISION OF THE COURT OF APPEALS

The court of appeals upheld the Board's findings as adequately supported by the record and enforced the Board's order (Pet. 27–37). With respect to the Board's finding that the machine printers were not supervisory employees, the court stated that an "employer cannot make a supervisor out of a rank and file employee by giving him the title and the theoretical power to perform one or more of the [statutorily] enumerated supervisory functions. The important thing is the possession and exercise of actual supervisory duties and authority and not the formal title. It is a question of fact in every case as to whether the individual is merely a superior workman or lead man who exercises the control of a skilled worker over less capable employees, or who is a supervisor who shares the power of management." Tested by this principle, the court concluded, "it cannot be said" that the Board's finding that the machine printers were not in fact vested with actual supervisory authority "was unwarranted by the evidence or without support in the decisions of the court" (Pet. 34).

The court found no prejudicial error in the ruling of the Board in the representation case denying petitioner's motion, filed after the Board's Supplemental Decision of March 13, 1956, to adduce additional evidence relating to the claimed supervisory status of the machine printers. The court upheld the ruling as a proper exercise of the Board's discretion (Pet. 37–38). The court also approved the ruling of the trial examiner in the unfair labor practice proceedings refusing to permit petitioner to adduce testimony with respect to the duties of the machine printers. The examiner, the court stated, "was justified in concluding that the offer was primarily an effort to reopen a question which had been decided by the Board at the representation hearing" and hence it was not error for the examiner to reject that testimony (Pet. 39). For these reasons the court also denied petitioner's motion to remand the case to the Board for the taking of additional testimony concerning the duties of the machine printers (Pet. 39).

ARGUMENT

1. Petitioner asserts (Pet. 13–18) that the Board's determination that the machine printers were employees and not supervisors rests upon an erroneous test, namely, as petitioner phrases it, "that it is the frequency of the exercise of delegated supervisory authority which determines whether or not a given employee is in fact a supervisor within the meaning of the Act." This contention plainly misconceives the basis of the Board's determination in the instant case. As the court below observed (Pet. 34), in ascertaining

whether or not certain employees have supervisory status, the "important thing is the possession and exercise of actual supervisory duties and authority and not the formal title. It is a question of fact in every case * * *." Accord: *National Labor Relations Board* v. *Quincy Steel Casting Co.*, 200 F. 2d 293, 296 (C.A. 1); *National Labor Relations Board* v. *Leland-Gifford Co.*, 200 F. 2d 620, 625 (C.A. 1). It would seem a matter of common sense that the absence for all practical purposes of any exercise of such authority by the employees in question, although not decisive, is nevertheless a significant factor to be taken into account in ascertaining whether the employer has in fact clothed the employees with actual, as distinguished from nominal or fictitious, supervisory authority. That is what the Board did here. Looking to all the surrounding circumstances, including the absence of any exercise of supervisory authority by the machine printers, the Board concluded that they had not in fact been vested with any real supervisory authority (*supra*, p. 6). This is not to say, as petitioner asserts, that the Board has made the existence of supervisory authority turn solely upon its exercise or non-exercise. On the contrary, all that the Board has done is to weigh that factor as probative and relevant evidence bearing upon the existence or non-existence of supervisory authority. In this posture, the case presents simply a factual issue and raises no question warranting review by this Court.

Contrary to petitioner's contention, neither of the two cases which it cites (Pet. 13) is in conflict with the decision below. In those cases the First and Sixth Circuits merely held that where an employee admittedly possesses or is clothed with real supervisory authority, the sporadic or infrequent exercise of such authority does not diminish his supervisory status. *National Labor Relations Board* v. *Leland-Gifford Co.*, 200 F. 2d 620, [illegible] (C.A. 1); *Ohio Power Co.* v. *National Labor Relations Board*, 176 F. 2d 385, 388 (C.A. 6), certiorari denied, 338 U.S. 899. That is not this case, for here the critical question was whether the machine printers ever in fact possessed any real supervisory authority.

2. Petitioner further asserts (Pet. 18–21) that the trial examiner erroneously refused to permit it (a) to adduce evidence in the unfair labor practice hearing upon the supervisory status of the machine printers and (b) to pursue a line of inquiry as to whether or not the discharged employees "carried out the duties and functions and responsibilities" of "Unit Supervisors" for the purpose of showing that petitioner had discharged them, whether supervisors or not, for their failure to do so (B.A. 190; Pet. 5–6). The trial examiner ruled that he would not permit petitioner to "relitigate the Board's findings and conclusions" with respect to the supervisory status of these employees but also stated that he would "permit the question of the witness concerning specific acts" of dereliction of duty by the five employees (B.A. 191).

To begin with, as the court below observed (Pet. 39) and as the record bears out (B.A. 167–168, 190–194, 210–211; R.A. 90, 111–115), the trial examiner was justified in concluding that the line of inquiry petitioner sought to pursue "was primarily an effort to reopen a question which had been decided by the Board at the representation hearing," *i.e.*, the supervisory status of the machine printers. In this setting, the examiner's ruling was correct. For, as this Court has stated in a similar situation, "a single trial of the issue was enough." *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U.S. 146, 162. Secondly, insofar as petitioner may have sought to show that the machine printers had failed to carry out their assigned duties and had been discharged for that reason, petitioner is in no position to assert prejudicial error. For the examiner expressly stated that while he would not permit the generalized inquiry described above, he would permit "question of the witness concerning specific acts" of dereliction of duties by the discharged machine printers (B.A. 191). If, as petitioner asserts, it sought to adduce this evidence, not for the purpose of relitigating the supervisory status of the employees, but rather to establish that it had discharged them for dereliction of duty, it should have been an easy matter to follow the line of inquiry which the examiner would have permitted. Petitioner's failure to do so (B.A. 194) serves only to emphasize that petitioner was pursuing its basic strategy to reopen the issue which the Board had decided adversely to it in the representation proceeding.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,
THOMAS J. MCDERMOTT,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
HANS J. LEHMANN,
Attorney,
National Labor Relations Board.

FEBRUARY 1959.

U. S. GOVERNMENT PRINTING OFFICE 1959